Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–17 OF 2005(J)
PS GILL, RICHARD MALANJUM AND AUGUSTINE PAUL FCJJ
26 OCTOBER 2005

Criminal Law and Procedure — Habeas corpus — Proper procedure — Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 — Detention issued by the Minister — Irregularities in arrest and detention — To what the extent a valid detention order made against a person can be vitiated by irregularities in his arrest and detention — Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), 3(2), 3(2)(b), 3(3), 4, 5(4) & 6(1)

The appellant was arrested for the purpose of investigation under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). He was detained at the police station lockup for further investigations. On 15 April 2004, the Assistant Superintendent of Police authorised the further detention of the appellant under s 3(2)(b) of the Act. On 11 June 2004, the Minister issued the detention order upon consideration of the report of investigation of the police officer submitted to him under s 3(3) of the Act and the report of the inquiry officer as required by s 5(4) of the Act. It was served on the appellant the same day. The appellant filed a writ of habeas corpus on 13 September 2004 to secure his release. It was argued in the High Court that the irregularities in the arrest and detention of the appellant under s 3(2) had vitiated the order of detention issued by the Minister under s 6(1). The High Court judge dismissed the application for the writ of habeas corpus. The issue for determination was the extent to which, if any, a valid detention order made against a person under s 6(1) of the Act could be vitiated by irregularities in his arrest and detention under s 3 of the Act.

Held, dismissing the appeal:

(1) Generally, a writ of habeas corpus must be directed against the current order of detention even when the earlier arrest is irregular. It is only when the wording of a statute requires a proper arrest as a condition precedent to the making of a subsequent detention order can a person make a valid complaint of the detention (see paras 9 and 11).

(2) The precondition to the exercise of jurisdiction under s 6(1) of the Act is, inter alia, only a consideration of the report of investigation. There is no stipulation in s 6(1) that it must be the result of a valid detention. The preparation of the report is governed by s 4 of the Act pursuant to which any person may be examined and it is not confined to an examination of only the detained person. The report of investigation therefore has no direct link with the detention; the only one being that it may contain a statement from the detained person. It can

still be considered by the Minister even if it contains a statement from a person whose detention under s 3(1) of the Act is irregular. This is because just as in the case of the use of illegally obtained evidence in a court of law, the Minister may also use such evidence subject to the weight to be attached to it (see para 12).

(3) The court was not to concern itself with the vagueness, sufficiency or relevancy of the grounds of detention. Thus, even if the report of investigation was prepared as the result of an illegal arrest, the weight to be attached to it was a matter exclusively within the purview of the Minister. The court should not be concerned with the use of the report of investigation by the Minister. The consideration of a statement made by an illegally detained person should not therefore be prohibited. The result was that the legality of the detention of a person under s 3(2) of the Act was not a condition precedent to the making of a detention order against him under s 6(1) of the Act (see para 13).

(4) The corollary is that a detention order can be made against a person under s 6(1) of the Act even when his detention under s 3(2) of the Act was irregular. The general rule that a writ of habeas corpus must be directed against the current order of detention therefore applies where a detention under s 6(1) has been made subsequent to an arrest and detention under s 3(1) and (2). It follows that where a detention order has been made under s 6(1), the writ of habeas corpus must be directed only against that order even if the earlier arrest and detention are irregular: *Barnardo v Ford* [1892] AC 326 referred. Thus, any irregularity in a detention order made under s 3(2) when it has been superseded by one under s 6(1) is not a relevant matter for consideration (see para 14).

[Bahasa Malaysia summary

Perayu ditangkap bagi tujuan siasatan di bawah s 3(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta tersebut'). Beliau ditahan di lokap stesen polis untuk siasatan lanjut. Pada 15 April 2004, Penolong Superintenden Polis telah membenarkan lanjutan penahanan perayu di bawah s 3(2)(b) Akta tersebut. Pada 11 Jun 2004, Menteri telah mengeluarkan perintah tahanan setelah menimbangkan laporan siasatan perintah penahanan yang dikemukakan kepada beliau di bawah s 3(3) Akta tersebut dan laporan pegawai penyiasat seperti yang dikehendaki oleh s 5(4) Akta tersebut. Ia disampaikan kepada perayu pada hari yang sama. Perayu telah memfailkan satu writ habeas corpus pada 13 September 2004 untuk menjamin pembebasannya. Adalah dihujahkan di Mahkamah Tinggi bahawa luar aturan yang berlaku terhadap tangkapan dan tahanan perayu di bawah s 3(2) tidak memberi kesan kepada perintah penahanan yang dikeluarkan oleh Menteri di bawah s 6(1). Hakim Mahkamah Tinggi telah menolak permohonan untuk writ habeas corpus. Persoalan yang perlu ditentukan adalah setakat mana, jika ada, suatu perintah penahanan sah yang dibuat terhadap seseorang itu di bawah s 6(1) Akta tersebut boleh membawa kesan akibat luar aturan dalam tangkapan dan tahanannya di bawah s 3 Akta tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Pada amnya, suatu writ habeas corpus hendaklah diarahkan terhadap perintah penahanan semasa meskipun tangkapan sebelumnya itu adalah di luar aturan. Hanya apabila perkataan suatu statut menghendaki tangkapan betul sebagai pra syarat untuk membuat satu lagi perintah penahanan maka bolehlah seseorang itu membuat aduan sah tentang penahanan itu (lihat perenggan 9 dan 11).

(2) Pra syarat untuk menggunakan bidang kuasa di bawah s 6(1) Akta tersebut adalah, antara lain, hanya satu pertimbangan terhadap laporan siasatan. Tiada penetapan dalam s 6(1) mengatakan ia hendaklah akibat daripada penahanan sah. Persediaan laporan itu dikawal oleh s 4 Akta tersebut menurut mana seseorang itu boleh diperiksa dan ia tidak terbatas kepada pemeriksaan orang yang ditahan sahaja. Laporan siasatan oleh itu tiada kaitan terus dengan penahanan; hanya sekadar ia mungkin mengandungi suatu kenyataan daripada orang yang ditahan. Ia masih boleh dipertimbangkan oleh Menteri meskipun ia mengandungi suatu kenyataan daripada seseorang yang mana penahanan di bawah s 3(1) Akta tersebut adalah di luar aturan. Ini hanya kerana, seperti dalam kes penggunaan keterangan yang diperoleh menyalahi undang-undang di mahkamah undang-undang, Menteri juga mungkin menggunakan keterangan tersebut bergantung pada kepentingannya (lihat perenggan 12).

(3) Mahkamah tidak perlu risau tentang ketaksaan, kekurangan atau kerelevanan alasan-alasan penahanan. Oleh itu, jika pun suatu laporan siasatan disediakan hasil daripada tangkapan yang menyalahi undang-undang, kepentingan yang terletak padanya adalah suatu perkara yang eksklusif dalam kuasa Menteri. Mahkamah tidak perlu hirau penggunaan laporan siasatan oleh Menteri itu. Pertimbangan suatu kenyataan yang dibuat oleh seorang yang ditahan menyalahi undang-undang tidak patut dilarang. Akibatnya, kesahan penahanan seseorang itu di bawah s 3(2) Akta tersebut bukan satu pra syarat untuk membuat satu perintah penahanan terhadap beliau di bawah s 6(1) Akta tersebut (lihat perenggan 13).

(4) Lanjutan daripada itu adalah bahawa satu perintah penahanan boleh dibuat terhadap seseorang di bawah s 6(1) Akta tersebut walaupun penahanan beliau di bawah s 3(2) Akta tersebut adalah di luar aturan. Rukun am bahawa suatu writ habeas corpus itu hendaklah diarahkan terhadap perintah penahanan semasa oleh itu terpakai di mana suatu penahanan di bawah s 6(1) telah dibuat berikutan suatu tangkapan dan penahanan di bawah s 3(1) dan (2). Justeru itu di mana suatu perintah penahanan telah dibuat di bawah s 6(1), writ habeas corpus hendaklah diarahkan hanya terhadap perintah tersebut walaupun tangkapan dan penahanan sebelumnya adalah di luar aturan: *Barnardo v Ford* [1892] AC 326 dirujuk. Oleh itu, apa-apa luar aturan dalam perintah penahanan yang dibuat di bawah s 3(2) apabila ia telah diganti oleh perintah di bawah s 6(1) bukanlah perkara relevan untuk dipertimbangkan (lihat perenggan 14).]]

Notes

For cases on proper procedue, habeas corpus, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1991–2008.

Cases referred to

Athanassiadis v Government of Greece [1969] 3 All ER 293 (refd)
Barnardo v Ford [1892] AC 326 (refd)
Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 (refd)
Kerajaan Malaysia & Ors v Nasharuddin Nasir [2004] 1 CLJ 81 (refd)
Mohamed Ezam Mohd Noor v Ketua Polis Negara & Ors [2002] 4 CLJ 309 (refd)
Ooi Ah Pua v OC Criminal Investigation, Kedah Perlis [1975] 2 MLJ 198 (refd)
R v Wishart (1910) 18 CCC 146 (refd)
Tan Boon Liat @ Allen & Anor; Tan Boon Liat & Anor, Re v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors; Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors [1977] 2 MLJ 108 (refd)
Tan Yap Seng v Ketua Polis Negara & Ors [1991] 4 CLJ Rep 118 (refd)
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3, 3(1), 3(2)(a), 3(2)(b), 3(2)(c), 4, 5(4), 6(1)
Emergency (Public Order and Prevention of Crime) Ordinance 1969
Fugitive Offenders Act 1906 s 8 [Canada]
Internal Security Act 1960 ss 8(1), 73(1)

Appeal from: Criminal Application No MT(4)–44–78 of 2004 (High Court, Johor Bahru)

RR Mahendran (K Sandrasegaran, Alvinthiren and Suresh T with him) (RR Mahendran & Co) for the appellant.
Tun Abdul Majid bin Tun Hamzah (Fadilah Begum bte Abdul Ghani, Tengku Amir Zaki bin Tengku Abdul Rahman with him) (Attorney General Chamber's) for the respondents.

Augustine Paul FCJ (delivering the judgment of the court):

[1] The dominant issue for determination in this case is the extent to which, if any, a valid detention order made against a person under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') can be vitiated by irregularities in his arrest and detention under s 3 of the Act. All references in this judgment to sections shall be to sections of the Act.

[2] Briefly stated, the facts of the case in relation to the principal ground of appeal of the appellant are that he was arrested by Constable Fauzi bin Khalid on 13 April 2004 at 3.45pm for the purpose of investigation under s 3(1). He was detained at the Tun HS Lee Police Station lockup for further investigations. On 15 April 2004 at 3.00pm, Assistant Superintendent of Police Jaafar bin Hj Mat authorised the further detention of the appellant under s 3(2)(b). The material part of his authorisation reads as follows:

> MAKA DENGAN DEMIKIAN, pada menjalankan kuasa-kuasa yang diberi oleh Seksyen 3(2)(b) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985, saya dengan ini

memberi kebenaran untuk melanjutkan tempoh penahanan orang yang dinyatakan di atas bagi jangkamasa tambahan melebihi 48 jam mulai jam 1545 hrs pada 15 April 2004.

[3] Acting Superintendent of Police Shukaime bin Abu Samah is a police officer designated by the Inspector General for the purpose of receiving the report of the circumstances of the arrest and detention and to report the same to the Minister under s 3(2)(c). In his affidavit affirmed on 10 January 2005, he said:

> … Pada 22 April 2004, saya telah menerima laporan hal keadaan penangkapan dan penahanan terhadap MOHAMAD FAIZAL BIN HARIS (selepas ini disebut sebagai 'Pemohon') dari DEPUTI SUPERINTENDAN POLIS BALJEET SINGH A/L KARTAR SINGH, seorang Pegawai Kanan Polis yang bertugas di Jabatan Narkotik, Ibu Pejabat Polis Kontinjen Kuala Lumpur.
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> Setelah menerima laporan tersebut, saya telah mengkaji dan meneliti laporan tersebut dan berpuashati bahawa terdapat sebab-sebab yang boleh dipercayai bahawa ada alasan-alasan yang mematutkan pemohon ditahan di bawah s 6(1) Akta tersebut. Oleh kerana itu, saya telah bersetuju bahawa penahanan terhadap pemohon dilanjutkan melebihi 14 hari dengan tujuan untuk meneruskan siasatan.
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> Pada 26 April 2004 jam 8.35 petang, saya telah menyediakan laporan hal keadaan penangkapan dan penahanan itu serta melaporkan keadaan tersebut kepada Menteri Dalam Negeri. …

[4] On 11 June 2004, the Minister issued the detention order upon consideration of the report of investigation of the police officer submitted to him under s 3(3) and the report of the inquiry officer as required by s 5(4). It was served on the appellant the same day. He filed a writ of habeas corpus on 13 September 2004 to secure his release.

[5] Learned counsel argued in the High Court that the irregularities in the arrest and detention of the appellant under s 3(2) had vitiated the order of detention issued by the Minister under s 6(1). The learned High Court judge did not agree with the submission and dismissed the application for the writ of habeas corpus. In the appeal before us, the argument was re-canvassed by the appellant. It is necessary to reproduce the relevant provisions of the Act in order to appreciate the argument advanced. They read as follows:

> Section 3
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> (1) Any police officer may, without warrant, arrest and detain, for the purpose of investigation, any person in respect of whom he has reason to believe there are grounds which could justify his detention under subsection (1) of section 6.
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> (2) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under subsection (1) of section 6.
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> Provided that —
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> (a) he shall not be detained for more than twenty four hours except with the authority of a police officer of or above the rank of Inspector;

(b) he shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent of Police;

(c) he shall not be detained for more than fourteen days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.

(3) The police officer making an investigation pertaining to a person arrested and detained under this section shall cause a copy of the complete report of the investigation to be submitted —

(a) to an Inquiry Officer appointed under subsection (1) of section 5; and

(b) to the Minister,

within such period as may be prescribed by the Minister by regulations made under this Act.

Section 4

(1) For the purpose of satisfying the Minister that an order under subsection (1) of section 6 should be made and for the purpose of enabling the Minister to furnish a statement under paragraph (b) of subsection (2) of section 9, a police officer making an investigation under this Act may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer.

(3) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(4) A police officer examining a person under subsection (1) shall first inform that person of the provisions of subsections (2) and (3).

(5) A statement made by any person under subsection (1) shall bear the date and time of making thereof and shall be signed by the person making it or affixed with his thumbprint, as the case may be, after it has been read to him in the language in which it was made and after he has been given an opportunity to make any corrections he may wish.

(6) The foregoing provisions of this section shall be without prejudice to the provisions of subsection (3A) of section 3.

Section 5

(1) There shall be appointed by the Minister in writing such number of Inquiry Officers as may be necessary for the purposes of this Act:

Provided that no police officer nor any person who is not legally qualified shall be appointed to be an Inquiry Officer.

(2) Upon receiving the report under subsection (3) of section 3, the Inquiry Officer shall inquire whether there are reasonable grounds for believing that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs.

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(3) An Inquiry Officer may, in his discretion, for the purpose of subsection (2) —

(a) require the attendance before him of a person detained under section 3;

(b) procure and receive all such evidence, whether oral or in writing and whether the same be admissible or not under any written law for the time being in force relating to evidence or criminal procedure, which he may think necessary or desirable;

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(c) summon and examine witnesses on oath or affirmation, and may for those purposes administer any oath or affirmation;

(d) require the production of any document or other thing in his opinion relevant to the case.

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(4) An Inquiry Officer shall submit his report in writing to the Minister within such period as may be prescribed by the Minister by regulations made under this Act.

Section 6

(1) Whenever the Minister, after considering —

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(a) the complete report of investigation submitted under subsection (3) of section 3; and

(b) the report of the Inquiry Officer submitted under subsection (4) of section 5,

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is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years.

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[6] The procedural requirements of s 3(2)(a), (b) and (c) read together, as they are required to be done so, are these. Under s 3(2)(a), no authorisation is required to detain the person arrested under s 3(1) for the first 24 hours. A detention for the next 24 hours requires the authority of a police officer of or above the rank of inspector. After the expiry of the 48 hours the authority of a police officer of or above the rank of Assistant Superintendent of Police is required under s 3(2)(b) if the person detained is to be detained any further for a period not exceeding 14 days. Section s 3(2)(c) is in two parts. The first part relates to the detention of a person beyond the 14-day period authorised under s 3(2)(b). It cannot exceed 60 days from the date of the initial arrest. The authority for detention for this period requires a report by a police officer of or above the rank of Deputy Superintendent of Police to the

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Inspector General or to a police officer designated by the Inspector General of the circumstances of the arrest and detention. The second part requires the Inspector General or the police officer so designated to further report the same to the Minister. There is no stipulation that this report must be made within the 14-day period as suggested in *Tan Yap Seng v Ketua Polis Negara & Ors* [1991] 4 CLJ Rep 118 but there must be evidence of the actual date it was made in order to determine whether it was done so 'forthwith' as required by s 3(2)(c). It must be observed that as the detention under s 3(2)(b) shall not be '… for more than forty eight hours …' and under s 3(2)(c) for not '… more than fourteen days …' with the maximum having been prescribed they have in contemplation a period of detention which is specific. Thus, the authority for detention must specify the precise period of days, not exceeding the

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permissible maximum, for which detention has been authorised. This is significant in order to ensure that a person is not detained unnecessarily.

[7] The facts of the case as enunciated earlier reveal that there has been non-compliance with the requirements of s 3(2)(a), (b) and (c). There is no evidence on record to show compliance with s 3(2)(a) in that there is nothing to indicate that a police officer of or above the rank of inspector had authorised the detention of the appellant for more than 24 hours. The authority to detain the appellant under s 3(2)(b) and (c) is general. With regard to the detention under s 3(2)(b) it is for a period '… melebihi 48 jam …' and in respect of s 3(2)(c) it is for a period '… melebihi 14 hari …'. They do not specify the precise period of days for which the appellant is to be detained under the two provisions. It follows that there have been procedural irregularities in the detention of the appellant prior to the issue of the detention order under s 6(1) by the Minister. This raises the question of whether the irregularities vitiate the subsequent regular detention order issued by the Minister.

[8] In order to resolve the issue under discussion, reference may be made to *The Law of Habeas Corpus* (2nd Ed) by RJ Sharpe which says at pp 180–181:

> A prisoner may apply for the writ from the very moment of arrest ('A person may apply while in the custody of a constable, immediately upon being arrested, and need not wait until he is incarcerated' per Rinfret J, *Re Isbell* (1929) 52 CCC 170 at 173 (SCC)), and in that sense, he may challenge the legality of his arrest (Examples of cases where habeas corpus was used to challenge a warrant of arrest are: R v Downey (1845) 15 LJMC 29; *Re Waters* (1888) 6 NZLR 545; Ex p Archambault (1910) 16 CCC 433 (Que KB)). However, where there have been valid proceedings subsequent to the arrest, which are offered in justification of the detention, the prisoner will not usually be able to get redress (*Ex p Scott* (1829) 9 B & C 446; *R v Weil* (1882) 9 QBD 701 (CA); *Re Parisot* (1888) 5 TLR 344; *R v O/C Depot Battalion, RASC Colchester, ex p Elliot* [1949] 1 All ER 373; *R v Whitesides* (1904) 8 CCC 478 (Ont CA); *R v Lee Chu* (1909) 14 CCC 322 (NSSC); *Re Webber* (1912) 19 CCC 515 (NSSC); *Re Gaudin* (1915) 34 NZLR 401; *R v Gage* (1916) 26 CCC 385 (Ont HC); *R v Gigliotti* (1936) 65 CCC 55 (Ont SC); *R v Haagestrom* (1942) 78 CCC 332 (BCSC)). The reason for this is twofold. First, there is the rule that habeas corpus only calls for justification of the detention at present. The second is to be found in the law of criminal procedure. It is a general principle that where an accused person has been illegally arrested and brought before a court for trial, the court will not lack jurisdiction over the person on account of the illegal arrest (*R v Hughes* (1879) 4 QBD 614 (Cr Cas Res'd). The Canadian cases, a few of which go the other way, are collected by Tremeaar, Criminal Code (6th ed 1964), 709–711. See also *Leachinsky v Christie* [1945] 2 All ER 395 at pp 403–404 per Scott LJ (varied [1947] AC 573): 'Neither the committing magistrate nor the trial court will lose jurisdiction merely because … the prisoner has been arrested in circumstances which, for any of the reasons I have stated, was unlawful, although the fact may well influence discretion as to bail; but the person so wronged will have his cause of action against the person who arrested him unlawfully; and in an action for false imprisonment every harm to the plaintiff casually (sic) resulting from the original wrong will be a matter for the jury to consider in assessing the quantum of general damages …). There may be grounds for appeal, or evidence may be rendered inadmissible, but the validity of the proceedings is not affected. It may be, of course, that the wording of a statute requires a proper arrest as a condition precedent to the valid exercise of jurisdiction. In such a case, relief will be afforded on habeas corpus (See eg *R v Wishart* (1910) 18 CCC 146 (Ont CA), a case under the Fugitive Offenders Act 1881 (Imp)), but this is nothing more than the use of habeas corpus to achieve jurisdiction review.

Apart from such an exceptional case, it has been consistently held that the applicant cannot complain of an irregular arrest when presently held on some other proper authority.

[9] It is therefore clear that generally a writ of habeas corpus must be directed against the current order of detention even when the earlier arrest is irregular (see *Athanassiadis v Government of Greece* [1969] 3 All ER 293; *Ooi Ah Pua v OC Criminal Investigation, Kedah Perlis* [1975] 2 MLJ 198). The exception to this rule can be gathered from the judgment of the *Ontario Court of Appeal in R v Wishart* (1910) 18 CCC 146 referred to in the passage from JR Sharpe cited earlier. In that case, s 8 of the Fugitive Offenders Act 1906 came up for consideration. It reads as follows:

> Whenever a warrant has been issued in a part of His Majesty's dominions for the apprehension of a fugitive from that part who is or is suspected to be in or on the way to Canada, the Governor-General or a judge of a court, if satisfied that the warrant was issued by some person having lawful authority to issue the same, may indorse such warrant in manner provided by this Act, and the warrant so indorsed shall be a sufficient authority to apprehend the fugitive and bring him before a magistrate.

[10] The fugitive was apprehended in Ireland and brought before the Police Magistrate in Canada without the warrant having been indorsed as provided by s 8. In his application for a writ of habeas corpus, he claimed that the indorsement of the warrant was a condition precedent to the exercise of jurisdiction by the magistrate and since it was not done so his arrest was unlawful with the result that the magistrate had no jurisdiction to enter upon the inquiry. His application was allowed and he was discharged. The principle of law that can be gleaned from this case is that where there is a statutory condition precedent to the making of an arrest it must be complied with in order to render the arrest lawful. In support of this view, reference may be made to *Re Tan Boon Liat @ Allen & Anor*; *Tan Boon Liat & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors*; *Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors*;*Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108 where Suffian LP said at p 109:

> In *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 1 MLJ 129 after the order of detention had been made against him, the Minister was required to do certain things, which Mr Karam Singh complained the Minister had not done. Here, on the other hand, the condition for the detention of the appellants after the period of three months is fundamental; that condition had to be satisfied before the order could be made; it was a condition precedent. Before the appellants could be further detained beyond three months the Board must have made recommendations on their representations. That condition precedent has not been satisfied and in my judgment their continued detention after that period was therefore unlawful, since it was not, in the words of art 5(1), 'in accordance with law'.

[11] It follows that it is only when the wording of a statute requires a proper arrest as a condition precedent to the making of a subsequent detention order can a person make a valid complaint of the detention.

[12] The precondition to the exercise of jurisdiction under s 6(1) is, inter alia, only a consideration of the report of investigation. There is no stipulation in s 6(1) that it must be the result of a valid detention. The preparation of the report is governed by s 4 pursuant to which any person may be examined and it is not confined to an examination of only the detained person. The report of investigation therefore has no direct link with the detention; the only one being that it may contain a statement from the detained person. It can still be considered by the Minister even if it contains a statement from a person whose detention under s 3(1) is irregular. This is because just as in the case of the use of illegally obtained evidence in a court of law the Minister may also use such evidence subject to the weight to be attached to it. In this regard reference may be made to *Field's Law of Evidence* (12th Ed) Vol 1 where it says, on the authority of *Balwant Singh v RD Shah Director of Inspection Income Tax AIR* 1969 Delhi 91, at p 429:

> It is true that in appropriate cases the court may order restoration of the property illegally seized but so far as the use of information gathered as a result of such seizure is concerned, the court, *or the appropriate authority*, has in any case, acting within the law, the power to call for such information and property and use the same in evidence … The information gathered, therefore, can otherwise be reached by the courts *or other concerned authorities*. … the records and information gathered as a result of illegal search and seizure can be used subject to the value to be attached to it or its admissibility in accordance with the law relating to evidence. (Emphasis added.)

[13] It must be observed that in view of the subjective nature of the exercise of discretion by the Minister in ordering detention as enunciated in *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, the court is not to concern itself with the vagueness, sufficiency or relevancy of the grounds of detention. Thus, even if the report of investigation was prepared as the result of an illegal arrest the weight to be attached to it is a matter exclusively within the purview of the Minister. The court will not be concerned with the use of the report of investigation by the Minister. The consideration of a statement made by an illegally detained person cannot therefore be prohibited. The result is that the legality of the detention of a person under s 3(2) is not a condition precedent to the making of a detention order against him under s 6(1).

[14] The corollary is that a detention order can be made against a person under s 6(1) even when his detention under s 3(2) was irregular. The general rule that a writ of habeas corpus must be directed against the current order of detention therefore applies where a detention under s 6(1) has been made subsequent to an arrest and detention under s 3(1) and (2). It follows that where a detention order has been made under s 6(1) the writ of habeas corpus must be directed only against that order even if the earlier arrest and detention are irregular. This view is supported by *Barnardo v Ford* (1892) AC 326 where Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. Thus, any irregularity in a detention order made under s 3(2)

when it has been superseded by one under s 6(1) is not a relevant matter for consideration. In this regard, *The Law of Habeas Corpus* (2nd Ed) by RJ Sharpe says at p 179:

> It has been held consistently that the relevant time at which the detention of the prisoner must be justified is the time at which the court considers the return to the writ. This rule means that nothing which has happened before the present cause of detention took effect will be relevant to the issue before the court, unless by reason of some special consideration arising from the particular proceedings.

[15] And at p 186:

> On the present state of the law, in almost every instance, the relevant time at which the detention is to be justified is the time at which the court considers the case. Prior illegality will not be relevant unless by reason of some special rule derived from the particular nature of the proceedings involved.

[16] Therefore a prior illegality which has ceased cannot be the subject matter of inquiry. That would also be the conclusion in the case of a detention order made under s 8(1) of the Internal Security Act 1960 and s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 subsequent to an arrest and detention made under both the statutes. It is perhaps appropriate to refer to*Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81 where it was held that an order of detention made under s 8(1) of the Internal Security Act 1960 is not tainted by an illegality or irregularity in the s 73 detention. However, the conclusion was reached not on the rationale as discussed in this judgment but on the principles enunciated in *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129. Such an approach would leave unanswered the effect of procedural irregularities in an earlier detention which has been superseded by another detention order. Be that as it may, that case made it clear that a court has no jurisdiction to hear a writ filed against the police for irregularities in a detention order under s 73(1) of the Internal Security Act 1960 when it had been superseded by one under s 8(1) thereby bringing into sharp focus the propriety of the judgment of this court in *Mohamed Ezam Mohd Noor v Ketua Polis Negara & Ors* [2002] 4 CLJ 309. The rationale underlying this judgment would, with respect, render the stand taken in the latter case unsustainable in law.

[17] By reason of the foregoing, the prior irregularities in the detention of the appellant under s 3(2) are not relevant to a consideration of the legality of the detention order made under s 6(1). The detention order made against the appellant under s 6(1) is regular. In the upshot we dismissed the appeal.

Appeal dismissed.

Reported by Peter Ling